



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/31253

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	NOT REVISED.
25 September 2024	
DATE	SIGNATURE

In the matter between:

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

APPLICANT

and

REBOSIS PROPERTY FUND LIMITED

RESPONDENT

This judgment has been handed down electronically by circulation to the parties / legal representatives by email and uploaded to an electronic file of this matter on Caselines. This judgment is deemed to have been delivered on the 25th of September 2024 at 10h00.

JUDGMENT

VAN DER MERWE, AJ

INTRODUCTION

1. This is an opposed rescission application whereby the applicant seeks to have the default judgment granted by the Honourable Thupaatlase, AJ rescinded. The court order reads as follows:

“Default judgment is granted against the respondent in the following terms:

Claim 1:

1. *The respondent is ordered to pay the amount of R17 231 962.51 to the applicant.*
2. *Interest in the aforesaid amount at the rate of 7% per year calculated from 5 July 2021 to date of final payment.*

Claim 2:

3. *The respondent is ordered to pay the amount of R414 857.28 to the applicant.*
4. *Interest in the aforesaid amount at the rate of 7% per year calculated from 5 July 2021 to date of final payment.*

General:

The respondent is ordered to pay the applicant's taxed cost on party and party scale."

2. The application is in two parts and the rescission is Part B. Part A was an unopposed urgent application, in which the applicant sought an order to stay the execution of the attached property belonging to the applicant. The order was granted by Wepener J on 27 September 2022.

THE FACTS

3. The applicant leased premises Rebosis Property Fund Ltd (Rebosis). The initial lease was for three years (2013 – 2016). During 2016, both parties agreed to extend the lease by a further three years (30 September 2016 – 31 July 2019). In terms of the applicant's version the lease continued on a month to month basis from 1 August 2019 until the applicant notified the respondent that it intends to vacate the building end of March 2020.
4. The respondent contends that the lease was extended during 2019 by a further three years until 31 July 2022. This contention was based on a letter, from an employee of the applicant that was received during October 2018, which the respondent alleges it accepted. The respondent refused to accept the termination of the lease by the applicant and relied on *inter alia* the said letter.

5. The applicant vacated its staff by the end of March 2020.
6. During July 2021, the respondent issued a summons against the applicant for the arrear rentals in the sum of R21 380 529.79. The summons was served on the applicant by the sheriff. The applicant did not respond to the summons. On 14 March 2022, the sheriff served the respondent's application for default judgment on the applicant. The applicant failed to respond to the application for default judgment. Consequently, the respondent obtained default judgment on 8 August 2022.
7. During August 2022, the sheriff attended to the attachment of the applicant's movable assets pursuant to a warrant of execution and proceeded to attach the applicant's property with a value of approximately R3 497 000.00.
8. The applicant came to know of the default judgment on the day the sheriff served the warrant of execution on 24 August 2022. The application was brought within the prescribed time period and on 14 September 2022.
9. The applicant ostensibly brings the application for rescission in terms of the common law.
10. The applicant wishes to raise the following defences against the claims:
 1. The parties never concluded an extension of the lease agreement for three years as alleged by the respondent.

2. The parties were on a monthly lease agreement, once the previous agreement terminated on 31 July 2019.
 3. On 26 February 2020, the applicant terminated the lease agreement and indicated that it would vacate the premises by 31 March 2020. The applicant could not vacate because of the supervening declaration of the state of disaster which prevented, amongst others, the movement of people and the removal of furniture from the premises.
 4. The applicant was only able to remove its furniture from the premises on 20 January 2021. Even if this date is not accepted, the respondent admits that the applicant's personnel vacated the leased premises during March 2020 and that the last of the applicant's furniture was removed during February and March 2021.
 5. It is the applicant's contention that the summons and the application for default judgment was received by the applicant, but that they were sent to the wrong departments that did not deal with the subject matter of litigation. No one reacted to the process notifying an intention to defend or resisting the application for default judgment.
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11. The respondent's claim relates to rental for the period of 1 August 2019 – 31 July 2022.
 12. The respondent claims that the applicant owes its rental for the period of 1

April 2020 – March 2021 in the amount of R17 231 962.51.

13. The second claim relates to the period of April 2021 – June 2021 and it is for R4 148 567.22.
14. The third claim is in the alternative in the amount of R17 231 962.51 allegedly for the period of April 2020 – February 2021.
15. All of these amounts pertain to the periods beyond January 2021, the date the applicant says it has vacated the premises, and therefore not liable for rental to the respondent.
16. The applicant's defence is that it is not liable for rental beyond the termination of the month to month lease, and that it is not liable for rental for the duration of the state of disaster because of the impossibility of performance.
17. It is not liable for any rental beyond January 2021 when it finally removed its furniture from the premises.
18. Furthermore, the respondent failed to mitigate its losses and it could have removed whatever remained of the applicant's furniture and leased out the premises.

ISSUES TO BE DETERMINED

19. Whether the default judgment granted on 4 August 2022 should be rescinded.

20. Whether the applicant was in wilful default.
21. Whether the applicant has a *bona fide* defence with some prospect of success on trial.

LEGAL PRINCIPLES

22. The legal principles applicable to rescission of judgments in terms of common law was again confirmed in the unreported judgment of ***Elia and another v Absa Bank (A5083/2021); 19617/2017 [23] ZAGPHJC 649 (6 June 2023)*** (Full Bench Appeal at par 11 thereof):

“The test for rescission under common law is trite namely that good cause must be shown. In order to establish good cause an applicant must set forth the reasonable explanation for the default and a bona fide defence that has some prospects of success regarding the issue of “good cause shown” in an application for rescission the following dictum in the matter of Chetty v Law Society of Transvaal 1985 (2) 756 (A) 746J-756C is apposite:¹

‘The appellant’s claim for rescission of judgment confirming the rule nisi cannot be brought under rule 31(2) or 42(1), must not be considered in terms of the common law, but must be considered in terms of the common law, which empowers the court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been

¹ ***De Wet and others v Western Bank 1979 (2) SA 1031 (A) at 1042 and Childerley Estate Stores v Standard Bank Ltd 1924 OPD 163***

shown.

The term “sufficient cause” or “good cause” defines precise or comprehensive definition for many and various factors are required to be considered² but it is clear that in principle in longstanding practice of our courts two essential elements “sufficient cause for rescission of judgment by default are: (1) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (2) that on the merits such party has a bona fide defence, which prima facie carries some prospect of success.³”

23. In ***Zuma v Secretary of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others 2021 (1) BCLR 1263 (CC) (17 September 2021)***, the Constitutional Court restated that two requirements for the granting of an application for rescission that needs to be satisfied under the common law as being the following:

“First the applicant must furnish a reasonable and satisfactory explanation for its default, second it must show that it has a bona fide defence which prima facie carries some prospects of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request

² *Ken’s Executors v Garin* 1912 AD 181 186 per Innes AJ

³ *De Wet’s case supra* 1042; *Piet Bosman Transport Works Company and others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 799 (A); *Smith NO Brummer NO and another; Smith NO v Brummer* 1954 (3) SA (O) at 357-8

to rescind.”

24. ***Silber v Ozone Wholesalers* 1954 (2) SA 345 (A) at 353** remains authority for the proposition that an applicant’s explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant’s conduct.
25. An element of the explanation of the default is that the applicant must show that it was not in wilful default. If the case that the applicant makes out in wilful default is not persuasive, it is not the end of the enquiry. The applicant’s case may be rescued if a *bona fide* defence is demonstrated.⁴
26. The defence raised must not only be decided against the backdrop of the full context of the case, but also be *bona fide* in the nature and grounds of the defence and the material facts relied upon must be fully disclosed.⁵

WILFUL DEFAULT

27. It is the applicant’s contention that when the summons was served on 5 July 2021 the sheriff was directed to the wrong department and that it should have gone to Group Finance Revenue.
28. It is contended that the Applicant receives approximately 1 500 legal processes per month, which averages at about 70 summonses and/or

⁴ ***Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at [8] – [10]; *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C-F**

⁵ ***Standard Bank of South Africa Ltd v L Nadaf* 1999 (4) SA 779 (W) at 784D-F**

applications and/or some other legal documents being served on the applicant daily.

29. The summons and the application for default judgment were received and directed to persons who were not involved in the subject matter of the summons and the application for default judgment. The applicant is a very large organization with 6 departments. The persons to whom the summons and application for default judgment were sent did not react and did not follow up with the sender and nor did the sender follow up. It is contended that the applicant did not deliberately refrain from opposing the summons, nor can its conduct be described as reckless or grossly negligent or that it ignored the summons. It simply sent the summons to the wrong recipients who did nothing about it because they thought that others were attending to the matter.

30. It is stated by the applicant that it is not in wilful default. The applicant did not deliberately refrain from entering an appearance to defend or resisting the application for default judgment. The applicants rely on the matter of ***Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading CC*** (unreported case number 26992/2019); 22 September 2019 at paragraph 15 which states as follows:

“Before a person can be said to be in wilful default, the following elements must be shown: (1) Knowledge that the action is being brought against him or her; (2) Deliberate refraining from entering appearance, though free to do so; and (3) A certain mental attitude towards the consequences of the default.”

31. The respondent contends that the applicant's explanation for its default is not reasonable and that it is clear from the facts that they were aware of the dispute and that they deliberately did not enter an appearance to defend.

RESPONDENT'S *BONA FIDE* DEFENCE AND PROSPECTS OF SUCCESS

32. It is the applicant's contention that the parties did not conclude a three year extension of the lease. In February 2020, the applicant terminated the month to month lease. The respondent avers that the letter of 10 October 2019, the applicant extended the lease agreement for a further three year period from 1 August 2019 – 31 July 2022, alternatively the applicant indicated that it requested for the term lease agreement for a further three year period. That is for the main claim. The third claim is in the alternative to claim 1 and is founded upon an alleged holding over of the premises, allegedly because the applicant failed to vacate the premises by 31 March 2020 and remained in occupation until February 2021 by leaving its equipment and furniture at the premises.
33. The claim is founded upon the alleged breach of the lease agreement for failure to pay for the period of April 2021 – June 2021.
34. It is common cause that the lease agreement had applied before the disputed final arrangement terminated on 31 July 2019. The dispute is what the arrangement was after 31 July 2019. On the applicant's version the parties were on a month to month lease, but did not conclude a three year extension because they disagreed on a material term that the applicant proposed to

include in the proposed extension. The respondent claims that by a letter sent to the applicant's official, the lease was extended by a further three years starting from 1 August 2019 and intended to terminate on 31 July 2022.

35. It is further common cause that the parties never executed any addendum evidencing the three year extension. The respondent relies on an unsigned addendum in the letter written by Ms Mokitle on 10 October 2019.
36. I was referred to various correspondence exchanged between the parties.
37. What is glaringly absent is a signed addendum that contains the terms and conditions of the alleged extension. It is contended by the applicant that the parties intended to extend the lease agreement that it did not do so because they could not agree on an important term, and that there were no extension of three years. Before me are two mutually destructive versions on the status of the agreement between the parties.
38. It is not clear whether the lease agreement was extended, beyond a month-to-month agreement. From the evidence before me, it would seem that the agreement was not renewed for three years.

CONCLUSION

39. The applicant proffers an explanation for its default and contends that it was not wilful. This is debatable, but in the circumstances, the defence advanced, compensates for the lack of proper explanation in respect of the applicant's

wilful default. In the matter of ***Zealand v Millborough* 1991 (4) SA 836 (SE) 8837H-838B** it is not required that the conduct of the applicant for rescission of default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent.⁶ Hence the element of wilfulness is one of the factors to be considered in deciding whether or not an applicant has shown good cause. While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient for good cause to be shown.⁷

40. In the matter of ***Silber v Ozone Wholesalers (Pty) Ltd* 1854 (2) SA 345 (A) at 352G-H** the Appellate Division held that the requirement of good cause cannot be held to be satisfied unless there is evidence, not only of the existence of a substantial defence but, in addition the *bona fide* presently held desire on the part of the applicants to actually raise the defence concerned in the event of the judgment being rescinded.
41. I find that on the facts before me that the applicant raises a *bona fide* defence with at least some prospect of success. The circumstances regarding the extension or alleged extension of the lease agreement needs to be ventilated at trial, and I find that where the applicant lacks a proper explanation for wilful default, it redeems itself in the defence raised.

⁶ ***Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J**

⁷ ***Harris v Absa Bank t/a Volkskas supra* at 529E-F**

IN THE PREMISES, I MAKE THE FOLLOWING ORDER:

1. The order granted by this Court on 4 August 2022 is rescinded and set aside.
2. The applicant must serve and file its plea within 20 court days from date of this order.
3. The costs of the application are costs in the main action.

VAN DER MERWE, AJ
HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

For the Applicant: Adv Bennie Makola SC

Instructed by: Nchupetsang Incorporated Attorneys

For Respondent: Gerrie Ebersohn

Instructed by: Gerrie Ebersohn Attorneys Incorporated